

~~CONFIDENTIAL~~January 27th, 1959COCOM Document No. 2869.79COORDINATING COMMITTEERECORD OF DISCUSSION

5. General

ONREVISION OF THE STRATEGIC EXPORT CONTROLS - EXCEPTIONS PROCEDURESJanuary 19th, 1959

Present: Canada, Denmark, France, Germany, Italy, Japan, Netherlands, United Kingdom, United States.

References: Document CH/1547, COCOM 471(Revised), 1473, 2869.5, 2869.13, 2869.55, 2869.62, 2869.75, 2869.77, 3230 and 3338.

1. The CHAIRMAN recalled that at the previous meeting a joint proposal for revising the COCOM 471 procedure had been submitted by the Belgian, United Kingdom and United States Delegations. He invited Delegates to give the views of their authorities on this proposal. Secondly he referred to the fact that some Delegations were linking their consideration of the 471 procedure to that of the de minimis procedure. He recommended that the Committee should attach importance to the spirit in which the eventually agreed text would be interpreted rather than to the possible meanings which might be attached to the wording in some years' time.

2. The JAPANESE Delegate stated that he could now confirm the ad referendum agreement he had given to the Belgian-United Kingdom-United States compromise proposal (COCOM 2869.77 paragraph 7). He then made the following statement:

"We have reported in detail to Tokyo the discussions held in the previous meeting. In view of the important problems involved, our authorities have so far given us only certain preliminary views. I should, however, like to raise these views since I think they are related to the basic problems on the matter.

3. "The first point is concerned with the linking of the 471 procedure and the "de minimis" procedure, which was raised at the previous meeting. Our authorities seem to have some difficulties in understanding the linking of the two procedures. The German Delegation, at the beginning of the discussions (COCOM 2869.62, paragraph 8) made a distinction between the procedure of shipments which do not prejudice the aims of the embargo policy, namely, the procedure for shipments of articles of little or no strategic value and the procedure for shipments which may constitute a security risk, namely, the procedure for shipments of articles of some strategic value. In general, we agree with such a distinction. If such a distinction of the two procedures is a right approach to the matter, any decision to revise these two procedures should be taken independently of each other. In other words, it does not seem to be very convincing to argue that since a new procedure to replace the present 471 procedure is more rigid than now, a more flexible or broader procedure should be established to replace the present "de minimis" procedure. We believe that these two procedures which are of a different nature, as set out in the German statement, should be considered on their respective merits and that they should not be linked to each other. The Japanese authorities supported the United Kingdom proposals to revise the present 471 procedure and to maintain the present "de minimis" procedure with only the value cut-

off changed. In doing so, the Japanese authorities had assumed that in the United Kingdom proposal as a whole, these two procedures were treated independently of each other. It would be helpful to our authorities if views or comments of other Delegations could be given on this point.

4. "The second point is more specific. It is concerned with the relation between the new German proposal for the "de minimis" shipment and the existing accident of definition procedure. It had been the rule of this Committee in the past that whenever any Member Government finds an article which is covered by the embargo lists but has little or no strategic value and therefore can be considered not to be within the intention of that definition, they can request an exceptional shipment under the terms of the accident of definition procedure. Now the German authorities propose to broaden the present "de minimis" procedure in such a way as to cover the shipment of articles of relatively high monetary value but of little or no strategic value. We wonder whether such shipments can be taken care of sufficiently by the existing accident of definition procedure. The present accident of definition procedure furthermore invites Member Governments to propose, if possible, redefinition of the item concerned, so as to maintain unanimous application by all Member Governments. This is a point which was already pointed out by the Danish Delegation at the previous meeting. It would be most interesting to our authorities if certain concrete cases could be shown to us, which do not fall under the terms of the existing accident of definition procedure but do fall under the new German "de minimis" procedure.

5. "The third point is the fear of the Japanese authorities which is similar to that already expressed by the Belgian Delegate at the meeting last year. We believe that, since the new embargo list was agreed upon unanimously after the careful study on strategic grounds of each item concerned, the authorities of all Member Countries are acting on the assumption that all items on the List are of strategic importance even though some of them do contain rather arbitrary cut-offs. We have a fear that if the German proposal to broaden the concept of the present "de minimis" procedure is adopted, theoretically speaking, any item with a figure of weight, power, diameter, etc., that is slightly above the cut-off of List I definition could always be submitted as having a minimum strategic value." Here the Delegate referred to the example of the forging hammer that had been mentioned by the Belgian Delegate (COCOM 2869.62 paragraph 58) and gave a further example, which he admitted was extreme, by pointing out the difficulties of comparing a 19.5 knot ship with one with a speed of 20.5 knots. Most items could give rise to the same kind of problem. "If, furthermore, some such requests are approved by the Committee, other Member Countries would be equally entitled to demand the same treatment for similar or different kinds of articles. If such a tendency became clear, the assumption made by Member Governments in the past that export requests from traders in respect to listed items were in principle to be refused would cease to exist, and this might, as the Belgian Delegate has already mentioned, lead to the frustration of the new controls scheme. We feel that the existing "de minimis" procedure and accident of definition procedure are sufficient and are therefore reluctant to accept the German proposal. Any comments from other Delegations on this point would be appreciated.

6. "Finally, the Japanese authorities have instructed me to reserve their final position on this matter, since the discussion has developed in a direction that had not been envisaged at the beginning. It will be after they have completed their study of the views of all Delegations, including those which will be expressed this afternoon, that the Japanese authorities will arrive at their final decision."

7. The DANISH Delegate endorsed the statement which had been made by his Japanese colleague and confirmed his ad referendum acceptance of the joint proposal.

8. The FRENCH Delegate said that he had no final instructions on the joint proposal since his authorities found that the last phrase was rather too strictly worded and discussions were still continuing in the appropriate

ministries. Paragraph 7 of COCOM 471 had stressed the importance of the quid pro quo, and the French authorities recognised gratefully the effort which had been made by the United States Government in agreeing to the deletion of the quid pro quo requirement but they were concerned at the effect of the last phrase of the proposed new text on political and public opinion. The Delegate said that it would be easier for his authorities to accept the joint proposal if the final phrase were amended to read: "... the risk of serious damage to the economic, political and social well-being of the exporting country."

9. The ITALIAN Delegate said that without wishing to prejudge his authorities' position on the de minimis procedure he could state that although he had no definite instructions, this proposal was giving his Government some difficulty of interpretation. He was very much interested in the amendment proposed by the French Delegate and undertook to report it to his authorities.

10. The NETHERLANDS Delegate commented that the amendment proposed by his French colleague seemed very useful. He personally thought that the wording of the joint proposal was too severe. He would give the official view of his Government at a later date.

11. The UNITED KINGDOM Delegate said that he envisaged under the now 471 procedure a whole range of possibilities. Not all items on List I had the same strategic value. If it was proposed to export under 471 a List I item of relatively small strategic value, it would be necessary for the exporting government to establish that, if the export were not made, there would be a risk of serious damage etc. but the risk shown would not need to be as great as it would in the case of a List I item of greater strategic value. There was a whole range of strategic risks involved in making different exports and a whole range of political and economic risks in not making them. The essential point was to establish that in a particular case the latter overrode the former.

12. The UNITED STATES Delegate recalled that in the last discussion the German Delegate had said that the joint text seemed weaker than that originally proposed by the United Kingdom. The French Delegate now said that the joint proposal was too harsh because the merits of the export must override the security risk involved. He wondered if the answer to these comments was perhaps some objective standard such as the retention of the quid pro quo. Commenting on the French amendment, the Delegate said that he considered that the phrase which the French Delegate had suggested should be deleted was axiomatic. There had to be serious factors in favour of the export, that is serious enough to override the embargo, and the Delegate said that he could not expect his authorities to agree to the deletion of this phrase.

13. The FRENCH Delegate pointed out that he had not entered a formal objection to the joint proposal. The first reaction of his authorities had simply been that it was somewhat too strict and he had therefore suggested an amendment. He reiterated that his authorities were ready to accept the original United Kingdom proposal.

14. The UNITED STATES Delegate said that when he had been assisting to draft the joint proposal he had prepared an alternative wording of the last phrase as follows:

"... the risk of serious damage, overriding the security considerations involved, to the economic, political or social well-being of the exporting country."

He emphasised that he interpreted this wording to mean exactly the same as the wording of the joint proposal; he put it forward, subject to approval by his authorities, to help clarify the intent of the joint text as he construed it or as an alternative wording he thought his authorities would support.

CONFIDENTIAL

- 4 -

COCOM Document No. 2869.79

15. The GERMAN Delegate informed the Committee that his authorities were prepared to agree to the compromise proposal put forward by the Belgian, United Kingdom and United States Delegations (COCOM 2869.77, paragraph 2) on the understanding that a satisfactory solution was found for the intermediate range of minimum shipments cases. Referring to the point made by the United States Delegate (paragraph 12 above), what he had in fact said was that the original Belgian counter proposal (which used the phrase "of an importance overriding ...") seemed to be less strict than the United Kingdom text (which used the phrase "of overriding importance"); he was not referring to the joint Belgium-United Kingdom-United States proposal. His authorities would carefully consider the new proposals that had been made during the present meeting, but since they concerned the larger exceptions cases only it remained important to find a solution for the intermediate cases.

16. Turning then to the statement made by his Japanese colleague, the Delegate said that he was grateful for the thoroughness with which the problem had been studied. He would like to make the following comments: First, with regard to the linking of the two questions, the German authorities had linked them together from the very beginning of the discussions on the revision of procedures. Both concerned exceptions to the List I embargo, and therefore it seemed to be useful to link the two procedures. The fact that they had not been linked in the past was the result of the way in which the problem had developed in the Committee. Exceptions to the general rule of embargo had started with the provisions of COCOM 471 (Revised) and it had later been found necessary to deal more benignly with smaller cases. It now seemed more logical to deal with both types of exception in one document.

17. Secondly, with reference to the relation between the minimum shipments and the accident of definition procedure, the Delegate said that his proposal did not concern cases of an "accident of definition" but dealt with particular transactions where the security risk involved was not high due to the particular circumstances of the transaction although the status of the items was not contested. In such cases, provided that special circumstances, for instance an approved civilian end-use existed, no recourse seemed to be needed to the strong new 471 procedure proposed. The Japanese Delegate had asked for examples of cases falling under the procedure proposed by the German authorities. The German Delegate quoted two recent French exceptions cases: one of cobalt alloy rods for China (CH/1547) and the other of an electronic <sup>measuring instrument</sup> ~~chronometer~~ for Hungary (COCOM 3338). It could not be claimed that the political, economic or social well-being of the exporting country depended on these exports, but there were nevertheless good reasons why they should be permitted. There was also the German proposal to export a teletype transmitting and receiving set to Rumania (COCOM 3230), which had taken months to go through the Committee and was again a case where the well-being of the exporting country was not involved but his authorities had been convinced that there were no security arguments against the transaction.

18. Thirdly, and this was a really important point, he fully shared the Japanese view that in principle all List I items were a priori to be considered strategic, but on the other hand, as had been pointed out by the United Kingdom Delegate, there were differences in the strategic weight of various items. It was not a question of cut-offs but of the items themselves. The Delegate thought that his colleagues would agree that some items were more important than others. The Japanese statement

CONFIDENTIAL

CONFIDENTIAL

- 5 -

COCOM Document No. 2869.79

had mentioned cut-offs, and the Delegate had done so himself in the past but only in order to clarify the difference in importance. The real concern was not with items of great value, such as ships or rolling mills. His authorities were thinking of smaller transactions up to \$25,000 or \$30,000 where there was no question of a country's well-being involved. They were convinced that public opinion would not understand why an exception request for an item with a relatively small value, for instance the export of a chronometer should be refused since no special political, economic or social considerations were involved while that of a ship or rolling mill was allowed under certain conditions. It was not their understanding that fixed value or quantity cut-offs needed to be imposed for the applicability of the minimum shipment procedure; they would be satisfied with the present wording of the procedure. But they wanted an unwritten understanding that requests for transactions up to \$25,000 or \$30,000 should be made under the "de minimis" procedure. They agreed that the burden of proof should rest with the requesting country, not with the Committee.

19. The German authorities wanted to make sure that such a request was not refused on purely procedural grounds. The United States Delegate had mentioned that there was always the ad hoc procedure - it sounded rather strange to be talking about the ad hoc procedure while the purpose of the revision was to dispose of the need for "ad hoc" submissions. The ad hoc procedure had become necessary since the existing procedures had proved too rigid in the past, his authorities felt that some procedural flexibility was of great importance for intermediate range cases up to \$25,000 or \$30,000. The question of precedents had also been mentioned: he agreed the problem existed but it also existed for 471 exceptions. For example, if there were serious unemployment in the ship-building industry in one Member Country, it was likely that other Member Countries would be affected in the same way and it would be difficult to refuse several similar exceptions requests. He believed that the danger of creating precedents should not be over-emphasised since each case was to be considered on its own merits. In concluding the German Delegate again expressed the hope that the Committee would find a satisfactory solution for the cases up to \$25,000 or \$30,000 by including them in the "de minimis" procedure.

20. The CHAIRMAN made the following comments: first, although the link between the 471 and the de minimis procedures still existed, the German Delegate's conditional acceptance of the joint proposal enabled the Committee to proceed more clearly on the main issue. Secondly, as for the de minimis procedure, the problem was simply based on the fact that the German and other Delegations would like to reach agreement on the principle that no case within reasonable limits was rejected merely on the procedural ground that its face value was too high.

21. The ITALIAN Delegate suggested the following alternative to the final part of the joint proposal: "... is deemed to involve, after due consideration or evaluation of the strategic factors, a serious risk to the political, economic or social situation of the exporting country." He pointed out that this text took up some of the principles of the original United Kingdom proposal together with the elements of the latest United States alternative. In reply to a question from the United States Delegate he stressed that it was mainly an editorial amendment. He did not consider the phrases "well-being" or "equilibrium" to be very precise.

22. The FRENCH Delegate said that the Italian proposal seemed satisfactory and he undertook to recommend it to his authorities.

23. The CANADIAN Delegate said that he could accept ad referendum the joint proposal with the alternative wording as put forward by the United States Delegate in paragraph 14 above.

CONFIDENTIAL

24. The CHAIRMAN observed that six Delegations (Belgian, Canadian, Danish, Japanese, United Kingdom, United States) accepted the joint proposal, one Delegation (German) had given a conditional acceptance and three Delegations (French, Italian, Netherlands) were still considering it. He emphasized that the word "security" as used in the various proposals had, in his mind, never meant the security of the exporting country but always referred to the security of the Western world as understood in the context of the embargo policy. He thought that this point might have given rise to some misunderstandings. He suggested that all Delegations should try to obtain acceptance of the joint proposal, using the alternative wording suggested by the United States Delegate (paragraph 12 above) and substituting the word "situation" for the word "well-being".

25. Turning then to the de minimis procedure, the FRENCH and ITALIAN Delegates reiterated their support of the German proposals.

26. The UNITED STATES Delegate commented that he found it difficult to see how a transaction to the value of \$25,000 or \$30,000 could be classed as a minimum shipment in strategic terms. None of the cases so far cited had been anywhere near to these figures.

27. The UNITED KINGDOM Delegate said that he agreed with the German statement recorded at paragraph 10 of COCOM 2869.77. The United Kingdom had always thought that the procedure referred to transactions of minimum strategic importance. He did not feel that a substantial change was required in COCOM 1473 if it were generally accepted that cases should not be rejected on grounds of value or quantity; a small drafting change in paragraph 1 of Annex A to COCOM 1473 seemed to be all that was required. He continued that the main argument against the German proposal was probably the fear that the Committee would be confronted with more and bigger exceptions requests of this sort. The Japanese Delegate had mentioned cases which were marginally above the List I cut-off figures: the answer was that such cases would have to be referred to the Committee, where they would be rejected if their merits were not well established. Finally he said that it was not the case that there were many requests of this kind in hand.

28. The FRENCH Delegate referred to his proposal to add the word "medium" to "minimum" in the phrase "minimum shipments procedure" (COCOM 2869.77 paragraph 12). He would be satisfied if the word "small" could be added to the word "medium".

29. The JAPANESE Delegate replied to the German comments on his opening statement. The German Delegate had cited the French export of cobalt alloy rods to China (CH/1547) but the Japanese authorities still considered that this could have been presented under the accident of definition procedure. He pointed out that Delegations submitting requests under this procedure were not obliged to propose a revised definition. In several cases of this kind the Japanese Government had given their agreement on the understanding that the case was regarded as having been brought forward under the accident of definition procedure. The German Delegate had also referred to the civilian end-use to which an item might be put: it had been the practice of the Committee not to rely completely on guarantees of civilian end-use from Communist countries. As far as other circumstances were concerned the Japanese authorities felt that the ad hoc procedure should be used in these cases because they were so highly specialised that they could not be foreseen. The Delegate said that he would argue that use of the ad hoc procedure should not be excluded when it proved necessary. The German Delegate had said that some items were less important than others: all Delegations were free to propose the revision of any item at any time, but when an item was on the International List the unanimous and simultaneous application of the embargo should be respected. The German Delegate had said that his authorities would not use this procedure with regard to ships but other Delegations might do so. The German Delegate also said that there were the same questions of

CONFIDENTIAL

- 7 -

COCOM Document No. 2869.79

precedents in the 471 procedure, but 471 had been rarely used whereas the new procedure might be used frequently, therefore reference to precedents should be avoided.

30. The UNITED STATES Delegate referred to his French colleague's remarks (paragraph 28 above) and said that his authorities could agree to the substitution of "small" for "minimum" in the United States proposal, but that still did not mean "medium". He confirmed that his authorities would not reject a proposal purely on the grounds of its value. He recalled that in COCOM 1473 there was reference to the cumulative effect of shipments and he informed the Committee that his authorities wished to include a reference to this effect in the new procedure. He observed that it seemed fanciful to think that a transaction of up to \$25,000 or \$30,000 could have negligible consequences. He agreed with his United Kingdom colleague that there were likely to be few cases in hand. Therefore the minimum shipments procedure should not be stretched to provide for them. As he had mentioned, exceptional cases involving extenuating circumstances not fitting the procedures could be submitted as ad hoc cases.

31. The DANISH Delegate subscribed to the remarks of his Japanese colleague.

32. The CHAIRMAN summed up the discussion by saying that he was optimistic as to the possibility of reaching agreement at the next round of discussions. The present debate had cleared a great deal of ground and it was now clear that when speaking of de minimis cases, what Delegations had in mind was the strategic value of the transaction in question and not the strategic value of the particular item on the embargo list. Furthermore it seemed that Members of the Committee were now prepared to agree that no request should be turned down on the purely procedural grounds of value and quantity, although the effect of cumulative shipments still had to be borne in mind.

33. The COMMITTEE agreed to resume the discussion on January 26th.

CONFIDENTIAL